

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through
5, inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

**DECLARATION OF BREWSTER KAHLE IN SUPPORT OF DEFENDANT INTERNET
ARCHIVE'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTERNET ARCHIVE

I, Brewster Kahle, declare as follows:

1. I make this declaration from personal knowledge, and if called to testify, I could and would testify competently thereto.

2. I founded the Internet Archive in 1996. I currently serve as its Digital Librarian and Chair of the organization's Board of Directors.

3. While the Internet Archive did not begin digitally lending books until 2011, providing universal access to books has been a part of its mission for nearly the entirety of its history.

4. Soon after its founding in 1996, the Internet Archive began hosting other digital content—including digital texts—in addition to its snapshots of the World Wide Web. At that time, the Internet Archive focused on hosting public domain books. Hundreds of years of literature could fit easily in storage of ever smaller size, and the Internet Archive made a point of demonstrating this in 2002, when it drove its Bookmobile ("1,000,000 Books Inside (soon)") across the country, allowing readers of all ages to access, download, and print books in the public domain.

5. The Internet Archive began scanning print books in 2004, when it helped form the Open Content Alliance. This consortium of libraries, universities, and companies—including the University of California, the University of Toronto, the Smithsonian Institution Libraries, and the National Archives of the United Kingdom, as well as Yahoo, Adobe, HP Labs, and Microsoft—worked together to preserve and provide online access to digitized books.

6. A few years later, the Internet Archive launched Open Library, which aimed to become the world's largest catalog of books and to provide free access to public domain books the Internet Archive had scanned.

7. The first decade and a half of improvements to technologies used for scanning print books and displaying their digitized text laid the foundation for the Internet Archive—along with the dozens of other libraries (from the Boston Public Library to the San Francisco Public Library) with which it partnered—to begin lending books online to patrons, for free, for short periods of time.

8. Today, the Internet Archive makes more than 3.6 million books available for digital lending, and millions more public-domain books available for permanent download.

9. The term “Controlled Digital Lending” was first used in or about 2017, but the Internet Archive has been practicing the concept of what we now call Controlled Digital Lending since at least 2011.

10. A nonprofit that works closely with the Internet Archive, Open Library of Richmond, holds legal title to and maintains physical possession of many of the print books in its physical archive facilities. For simplicity, regarding ownership of print books, in this declaration I use the term “Internet Archive” to refer collectively to the Internet Archive and Open Library of Richmond.

11. The Internet Archive has implemented limitations on access to books in its digital lending system: for example, the Internet Archive’s physical books do not circulate while the digital version is loaned, the Internet Archive applies controls to what patrons can do with copies while those copies are loaned to them (for instance, patrons cannot copy passages from the borrowed book), and the Internet Archive limits access to books based on feedback from rightsholders about specific materials.

12. The Internet Archive lends books—again, for free—to patrons for a limited time at its own expense. Those expenses include purchasing and maintaining equipment, hiring and

paying personnel, and acquisition and storage costs for the physical books that are being digitally loaned. The Internet Archive has spent millions of dollars developing and operating its implementation of Controlled Digital Lending.

13. The Internet Archive strives to keep physical books it owns—as well as the digitized versions—forever. The Internet Archive does not make a digitized book unavailable for lending after a certain amount of time or after a certain number of check-outs.

14. The Internet Archive's book digitizing activities pursuant to agreements with libraries are not a commercial business. The vast majority of scanning relationships the Internet Archive has with libraries involve the scanning of public domain books. These books are not made available for borrowing through the lending library: Internet Archive patrons are able to download public domain materials with no restrictions. Therefore, apart from a few exceptions, books subject to scanning agreements the Internet Archive enters into with libraries are not the books the Internet Archive lends to patrons.

15. Even though ebooks don't degrade in the same way that physical books do, a huge amount of money and effort are required to maintain the integrity of a digital file that constitutes an ebook. These digital files are stored on servers, and the servers that host data at the Internet Archive require constant maintenance and repair. The physical servers themselves range from nearly nine years old to brand new, and components of those servers are replaced regularly when they fail or when they are damaged by electrical or environmental conditions. Currently, a new server with a full set of hard drives costs tens of thousands of dollars. The hard drives in a server fail regularly—on average, two to three drives fail per day out of our fleet of nearly 30,000. This ongoing maintenance requires an operations team consisting of five full-

time employees. To the extent Plaintiffs suggest that digitized books can be set aside for years without technical maintenance and still be accessed, they are incorrect.

16. The Internet Archive or Open Library of Richmond lawfully acquire print books by purchasing or receiving a donation. The Internet Archive digitizes physical books to which we—or Open Library of Richmond—have legal title.

17. Before digitizing a book it lawfully acquires, the Internet Archive’s policy is to ascertain whether the book is one the Internet Archive affirmatively wants to digitize.

18. The Internet Archive’s policy is not to scan books when the ISBN affixed to the book is not valid or when the ISBN yields metadata that does not match the book.

19. The Internet Archive does not receive a payment from Better World Books every time a user clicks on a link on the Internet Archive’s website. The Internet Archive only receives a small amount from Better World Books each time a user clicks on a link to Better World Books’s website *and* the user buys a book from Better World Books using that link. From the inception of the program (on or about October 18, 2016) through February 10, 2021, the Internet Archive received only \$5,561.41 in such revenue.

20. The Internet Archive, like many non-profits, allows visitors to its website to donate to it. Donate buttons appear on nearly every page of the Internet Archive’s website. Open Library also encourages its patrons to buy copies of the books it lends from third-party bookstores. It has links on its book pages that patrons can click on if they are interested in buying the book. These are “affiliate links.” Books pages on OpenLibrary.org, for instance, often have affiliate links for Better World Books, Amazon, and bookshop.org. If a patron clicks on one of these links and then uses that link to buy a title from the bookseller, the Internet Archive receives a small amount.

21. The Internet Archive works with partner libraries through the Open Libraries program to help those libraries provide access to the non-circulating copies of books they own. Only those with an Internet Archive patron account can borrow books through the Internet Archive's digital lending system. And so, if three other libraries have non-circulating copies of a book that they have contributed via the overlap analysis, and Internet Archive owns one copy, a total of four Internet Archive patrons can borrow that book at a time. Those Internet Archive patrons may also be patrons of other libraries (including the libraries who contributed non-circulating copies), or they may not; what matters for the Internet Archive's lending is that they are patrons of the Internet Archive.

22. Three of the four Partner Libraries who withdrew their books from the Open Libraries program after this lawsuit was filed withdrew as their physical facilities were reopening.

23. The Internet Archive's agreements with Partner Libraries require overlap analyses to be run at least quarterly. The Internet Archive currently runs overlap analyses monthly.

24. The Internet Archive does not view itself as a competitor to OverDrive, Amazon, or other similar websites or services. Nor do we offer similar services to these entities' services. We do not license ebooks—to other parties such as patrons or from aggregators or publishers.

25. Anyone who signs up to be a patron may borrow books from the Internet Archive regardless of other libraries they are patrons of. Any library can link to the Internet Archive.

26. The Internet Archive is not aware of any instance in which the "owned to loaned" ratio was exceeded as the result of physical access to a physical book owned by a partner library.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on 9/2/2022, in San Francisco, California.

DocuSigned by:
Brewster Kahle
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BREWSTER KAHLE

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2022 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Joseph C. Gratz

JOSEPH C. GRATZ